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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 891

ROY G. ANDERSON and CURRIER & CARLSEN, INCORPORATED, a corporation, *Petitioners*,

vs.

A. ALEX SHUFORD, JR., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on July 27, 1965.

CITATIONS TO THE OPINIONS BELOW

The opinion of the District Court (R. 46) is unreported. The opinion of the Court of Appeals printed in the Appendix hereto, at page 15, is not yet reported. The opinion of the Court of Appeals on the petition for rehearing, printed in the Appendix hereto, at page 29, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 27, 1965, Appendix, page 29. A timely petition for rehearing was filed and rehearing was denied by written opinion on October 14, 1965 (Appendix, page 29). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1958).

QUESTION PRESENTED

Whether breach of an agreement to transfer real property to a joint venture, the transfer not being designed to secure the obligation of either party, is sufficient to create a "lien" or "claim" within the meaning of 28 U.S.C. § 1655 (1958) and thus permit a District Court to exercise jurisdiction over a nonresident.

STATUTES INVOLVED

The statutory provisions are 28 U.S.C. § 1655 (1958) and 28 U.S.C. § 1391(a) (1958). 28 U.S.C. § 1655 (1958) provides:

> "In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.
>
> "Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is

not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

"If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

"Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just."

28 U.S.C. § 1391(a) (1958) provides:

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

STATEMENT

The Respondent (hereinafter sometimes referred to as "Shuford") filed a complaint against the Petitioners in the United States District Court for the District of Colorado on February 17, 1964. (R. 4-11.) The jurisdiction of the District Court was invoked under diversity of citizenship, it being alleged in the complaint that the Respondent was a citizen of North Carolina, the Petitioner Anderson (hereafter sometimes referred to as "Anderson"), a citizen of California, and Petitioner Currier & Carlsen, Incorporated (hereafter sometimes referred to as "Currier & Carlsen, Inc."), a California corporation doing business in the State of Colorado. It was further alleged that the amount in controversy exceeded $10,000, exclusive of in-

terest and costs. The complaint filed by Respondent alleged that the Petitioners and other persons had interests in certain real and personal property, that the Petitioner Anderson breached certain agreements and contracts with Respondent concerning real and personal property and that Petitioner Anderson wrongfully concealed and transferred certain property. The complaint also alleged that the action was one within the provisions of 28 U.S.C. § 1655 (1958) (hereafter referred to as "Section 1655") and that service of process on Anderson could be made under the provisions of that statute.

The action described above, which is the subject matter of this Petition, represents the second attempt by Respondent to proceed with his lawsuit. On September 3, 1963, the Respondent filed a complaint in the District Court for the District of Colorado against the Petitioners, which contained allegations almost identical to those found in the complaint in the case at bar. The Respondent in the earlier action, being Civil Action No. 8181, filed a lis pendens against the real property described in that complaint, which is the same real property described in paragraph 17 of the complaint in this action. The Petitioners responded to the complaint in Civil Action No. 8181 with motions and memorandum briefs similar to those filed in this action. The Respondent, after amending his complaint once and after filing a motion to amend it a second time, finally dismissed the action on notice under Rule 41(a) of the Federal Rules of Civil Procedure. On the date of this dismissal, February 17, 1964, the Respondent filed in the District Court the complaint that is involved in this action, and on the same date filed another lis pendens against the Colorado real property. (R. 12-14.) The recording of the two successive lis pendens has clouded title to the real property owned by Anderson for a period of over two years, thereby preventing any transaction with respect to the property and affecting not only Anderson, but other persons, some of whom are named in the complaint but are not parties, who have some interest in the property.

The summons and complaint were served upon the

agent for service of process for Petitioner Currier & Carlsen, Inc., by the United States Marshal on February 18, 1964. (R. 16.) The Respondent filed a "Motion for Service of Summons by Publication" with respect to the Petitioner Anderson, and obtained an "Order for Service by Publication" from the District Court. The summons was subsequently published for seven consecutive weeks in a Denver, Colorado newspaper. (R. 17-18.) In response to the complaint a motion to dismiss was filed on behalf of Petitioner Currier & Carlsen, Inc. on April 20, 1964, on the ground, among others, that there was improper venue because the action was commenced in the wrong district. (R. 19.) On April 28, 1964, by special appearance, Petitioner Anderson filed a motion to quash the service of summons and dismiss the action on the grounds that (1) the District Court lacked jurisdiction over the person of Anderson, (2) there was improper venue in that the action was commenced in the wrong district, and (3) the process was insufficient under the Federal Rules of Civil Procedure. (R. 19-20.)

Following the filing of memorandum briefs in support of and in opposition to the motions of Petitioners, the District Court on June 22, 1964, entered an order dismissing Respondent's complaint. (R. 46-51.) The court's order analyzed the allegations in the complaint in light of the provisions of 28 U.S.C. § 1391(a) (1958), the venue statute applicable to diversity of citizenship cases, and of Section 1655 which creates an exception to this venue statute. The court held that the aims and objects of Respondent's complaint were such that the nature and character of the action were in personam and not in rem and, therefore, could not be maintained under the provisions of Section 1655. Since Section 1655 did not apply, the court held venue was not properly laid in the District of Colorado and the complaint was therefore dismissed.

On July 27, 1965, the court below reversed the decision of the District Court. The Court of Appeals held that the complaint essentially stated a claim to enforce a lien on or a claim to the title of real property within the District of Colorado and that, therefore, venue was properly laid

in that district and service of process was permissible upon the Petitioner Anderson by virtue of the provisions of Section 1655. The court found that the complaint expressly alleged an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the complaint and that such an agreement, if sustained by proof, would create an interest or claim in land within the provisions of Section 1655. The court also found that the complaint alleged that the Petitioner Anderson fraudulently withheld or diverted property from the Respondent under circumstances giving rise to a constructive trust, and that Respondent also had a lien interest through the joint venture undertaken by the Respondent and Petitioner Anderson. Both of these factors, the court stated, would also support the application of Section 1655 for purposes of venue and service of process.

Finally, the court, in a per curiam opinion, denied Petitioners' petition for rehearing. The opinion dealt primarily with Petitioners' contention that the District Court's opinion should have been affirmed because of defective service of process on Anderson. While the court discussed the issue in light of the District Court's order, it also stated that the point could well have been deemed waived for failure to properly raise it on appeal. However, the issue of service of process, along with all other issues in the record, was reserved for appeal by Petitioners' filing of Appellees' Reply to Appellant's Designation of Record on Appeal and Statement of Points. (R. 2-3.) Furthermore, the issue of service of process was argued in Petitioners' brief in the court below.

REASONS FOR GRANTING THE WRIT

I.

The court below set out several grounds in support of its holding that the complaint of Shuford was an action to enforce a lien or a claim to real property within the District of Colorado, and therefore within the provisions of Section 1655. The primary basis for the court's holding

appears to be embodied in the following statement in its opinion (Appendix, page 21):

> "The complaint in this case, apart from any other theory presented by it, expressly alleges an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the complaint. All of the other allegations in a sense orbit around this alleged agreement."

The court held that such an agreement created a claim or interest in the Colorado real property.[1]

Notwithstanding the allegation that the Colorado real property was involved in the agreement between Shuford and Anderson, there is no allegation that it was ever transferred by Anderson, the fee owner, to the joint venture. Indeed, the whole sum and substance of Shuford's allegations throughout the complaint is that Anderson failed to abide by the agreement by continuing to deal with the property as his own without transferring it to the joint venture. Thus, the gravamen of the complaint is that Anderson had breached the agreement, and the general relief requested would require either rescission of the agreement with concommitant recovery of the sums advanced by Shuford or specific enforcement of the agreement to transfer the property to the joint venture. Either way, Shuford has no lien or claim relating to the real property. The decision of the court below holding that the allegations were sufficient to bring this proceeding within Section 1655 is directly contrary to and in conflict with *Jones v. Gould,* 149 Fed. 153 (6th Cir. 1906), where the court held that an action against certain syndicate managers for misconduct

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[1] The court below uses the terms "claim", "lien", and "interest in the land" synonymously and interchangeably throughout its opinion without ever stating which of these terms is applicable in the present case so as to bring the proceeding within Section 1655. Not only does this usage make it difficult to understand the opinion, but it also creates confusion because it is readily apparent that *every* plaintiff has an "interest in the land" belonging to his adversary by virtue of his potentially becoming a judgment creditor of the defendant.

and breach of the syndicate agreement was merely a controversy over the management of the business and did not confer jurisdiction under a predecessor statute to Section 1655. In both the *Jones* case and in the present proceeding, the wrong complained of was the breach of the agreement by one of the parties thereto and the relief sought was an accounting and dissolution of the joint venture or syndicate. Thus, it is clear that the decision of the court below is in conflict with the cited holding of the Court of Appeals for the Sixth Circuit.

The decision below is also in conflict with *Vidal v. South American Sec. Co.,* 276 Fed. 855, 870 (2d Cir. 1921), an action involving the predecessor to Section 1655, where it was stated that a lien:

> "is a charge or incumbrance upon specific property which is security for the payment of money or the performance of some duty. . . . If one enters into a valid executory agreement whereby he indicates his intention to make some particular property a security for a debt, or promises to convey, or assign or transfer the property as security, the courts of equity hold that the mere agreement creates an equitable lien which is enforceable against the property. . . ."

It is not alleged in the instant case that the subject real property was to be security for any conduct by the Petitioner Anderson. The *Vidal* court went on to state, very apropos the present case:

> "But there was never any agreement to give the complainant a lien on moneys paid or on stocks or bonds delivered to Bright and out of which the profits were to be realized. Bright cannot be regarded as a constructive trustee holding such moneys and stocks and bonds in trust for the complainant. He was at liberty to use the moneys and stocks and bonds as he saw fit and could pass an unincumbered title to one with notice. He was simply a debtor to the complainant for 30 per

> cent. of the net profits after all proper deductions had been made." Page 871.

Under the allegations in the complaint in this action, Anderson was similarly at liberty to deal with the Colorado real property as he saw fit, especially since the allegations do not claim that he had ever transferred the property to the joint venture. The extraordinary similarity of the instant case with the *Vidal* case presents a conflict between the Courts of Appeal for the Tenth and Second Circuits, primarily because the court below failed to distinguish between the "right of action" for certain property, such as in the instant case, and a "charge" upon the same property which would confer jurisdiction under Section 1655 — the distinction so forcibly made by the quotation from Justice Story in the *Vidal* case. Thus, the court below found that the right to a portion of the consideration for an agreement in itself is a "lien" or "claim" for that consideration. And so, the in personam right of specific performance becomes the equivalent of the in rem lien.

The decision of the court below is also in conflict with the *Vidal* case in regard to the existence of a "claim" in the instant action, for it was stated in *Vidal v. South American Sec. Co., supra,* at 871-72:

> "The term 'claim,' as used in the section, is the right to lay claim to a specific property which is in another's possession....
>
> "As quoted by Jacobs from Plowden, giving the definition of Chief Justice Dyer, it is 'a challenge of the ownership or property that one hath not in possession but which is detained from him by wrong.' ... It has been held that where the plaintiff has no special claim against the property, or any right in or to it different from any other general creditor of the defendant, or any one having a right to sue the defendant in tort, he cannot use the existence of the property within the district as a basis for bringing his suit within it against a defendant who is not an inhabitant

> of the district or found in the district or does not voluntarily appear therein."

In the instant case, Shuford does not challenge the *ownership* of the Colorado real property by Anderson, the fee owner, nor that the property is *detained from him* by wrong. Rather, Shuford's allegations demonstrate that his right to the property is no different from any other general creditor of Anderson. Contrary to *Vidal v. South American Sec. Co., supra,* the Court of Appeals for the Tenth Circuit expands "claim" within Section 1655 to encompass *every* potential right to the jurisdictional property.

Moreover, the court below found that "all of the other allegations in a sense orbit around this alleged agreement" that Shuford and Anderson were each to have a share in the property. The complaint contains allegations of breach of contract, fraudulent misrepresentation, necessity of discovery, accounting and tracing of moneys, and prayers for complete adjudication of the rights of all parties, an injunction, appointment of a receiver, equitable lien, constructive trust and for interest (indicating a demand for a money judgment). In view of these allegations and prayers, this holding of the Court of Appeals presents a clear conflict in principle with *Dan Cohen Realty Co. v. National Savings & Trust Co.,* 125 F.2d 288 (6th Cir. 1942). In the latter case, which held that the predecessor to Section 1655 did not apply to actions for specific performance, Judge Martin quoted from an earlier Sixth Circuit case:

> "'It is a settled rule that the aims and objects of an action determine its character, and that a proceeding which aims at the person of the defandant and not at his property or some other thing within the power or jurisdicion of the court is not an action in rem.'...
>
> "The gist of the relief prayed in the instant case is for a personal decree against appellees, just as it was in the Fifth Circuit case." Page 290.

The allegations and prayers in the instant case clearly show that it is "a proceeding which aims at the person of the defendant and not at his property." Contrary to the principles enunciated by the *Dan Cohen* case, the court below has latched onto several statements which are allegedly in rem in nature, and has used those statements to convert the entire action into an in rem proceeding within the purview of Section 1655. Such a result is in total conflict with the decision of the Court of Appeals for the Sixth Circuit in *Dan Cohen Realty Co. v. National Savings & Trust Co., supra,* and the decisions of other Courts of Appeal cited therein.

The solution suggested by the court below, namely the granting of a motion to make the complaint more definite, not only totally destroys any limitation on the scope of Section 1655, but also forces a defendant to waive the protection of venue requirements and submit to in personam jurisdiction. For the very act of this Petitioner Anderson, or any other defendant, in moving to make a complaint more definite would constitute a personal appearance and a waiver of venue under Rule 12(h) of the Federal Rules of Civil Procedure. The court below recognized, at least *sub silentio,* that this result was possible in the comments in footnote 8 on page 9 of its opinion (Appendix, page 19). The very existence of this ambivalence on the part of the court below would make any defendant, including these Petitioners, hesitant to pursue the course of action suggested, and to subject a defendant to such a course of action, as his only relief, would be highly unjust. Furthermore, the solution suggested by the court below also opens wide the doors of the Federal courts in any forum where a plaintiff can locate any property of the defendant, real or personal, so long as some *allegation* of an in rem character is made, no matter how frivolous, inconsequential, or how many additional in personam allegations are made. Under such circumstances the restrictions of 28 U.S.C. § 1391(a) (1958) become meaningless because the exception thereto, 28 U.S.C. § 1655 (1958), is made all-encompassing.

The additional grounds set out by the court below in holding that Section 1655 was applicable herein were that the complaint alleged acts giving rise to a constructive trust against the Colorado real property as well as a "lien interest" against the property arising from the alleged joint venture of the parties.[2] Since the complaint clearly shows that the Colorado property was acquired by Anderson prior to entering into any agreement whatsoever with Shuford, a constructive trust cannot be imposed thereon, for:

> "A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may arise because it was *acquired* through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property." 3 SCOTT, TRUSTS, Sec. 404.2 (1939). (Emphasis added.)

Further, since the property was acquired before the alleged joint venture agreement, and since there is no allegation that it was ever transferred to the joint venture, there can be no "lien interest" against that real property arising from such a joint venture. Thus, these two additional holdings by the court below are clearly erroneous. More importantly, all of the holdings of the court below display a refusal to confine the provisions of Section 1655 to liens or claims which are pre-existing. In so doing the court is in direct conflict with the decision in *McQuillen v. National Cash Register Co.*, 112 F.2d 877, 880 (4th Cir. 1940), which

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[2] It should be noted that Shuford in his prayer for relief in the complaint does not ask for the enforcement of a lien, constructive trust or resulting trust *in the Colorado real property* but simply asks, in the abstract, for the ". . . enforcement of an equitable lien, together with a constructive trust, resulting trust, and such other further and different relief as the Court may deem meet and proper in the premises, together with interest and costs." (R. 11.)

held that one of the three essential pre-requisites for the utilization of the statute which was the predecessor to Section 1655 is that "the proceeding must be in aid of some pre-existing claim, existing prior to the suit in question, and not a proceeding to create for the first time a claim to the property as the effect of the proceeding itself."

II.

The confusion resulting from this expansion of the application of Section 1655, in conflict with well settled principles and decisions of other Courts of Appeal cannot be underestimated. The effect of the decision below on litigants and the federal courts, particularly in the Tenth Circuit, will be enormous. The attempt by the court below to strain the obvious meaning of Section 1655 to cover the case at bar, coupled with its comments in the opinion (Appendix, page 27) that to hold otherwise would "hardly be in keeping with the spirit of modern federal court procedures," is in conflict with the policy of this Court as expressed in *Olberding v. Illinois Cent. R.*, 346 U.S. 338, 340 (1953), where it was stated that the requirement of venue is "specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." Yet in broadly construing 28 U.S.C. § 1655 (1958) in keeping with the "spirit of modern federal court procedures," the court below practically nullifies the general venue statute, 28 U.S.C. § 1391(a) (1958).

If the decision below is allowed to stand, litigants in literally thousands of cases could avoid the venue requirements of 28 U.S.C. § 1391(a) (1958). Petitioners request this Court to consider the effect of this holding, for under it every action based on an agreement concerning the disposition of real or personal property within the forum in any manner whatsoever could be brought in that forum pursuant to the provisions of Section 1655. Furthermore, under this holding a plaintiff could, in an action alleging a breach of contract to convey or dispose of property,

bring his lawsuit within the ambit of Section 1655 merely by asking that a lien be imposed upon or that he be declared to have an interest in the particular real property. In reality, of course, the proceeding would be one for specific performance even though it has been held in *Dan Cohen Realty Co. v. National Savings & Trust Co., supra,* that an action for specific performance cannot be brought under 28 U.S.C. § 118 (the predecessor of Section 1655) since it is an in personam action. But this holding can be sidestepped under the rationale of the decision below, by simply asking for a "lien" rather than or in addition to "specific performance." If the plaintiff prevails at trial, he will receive the property or its equivalent in any event. Thus, the decision of the court below would make it possible for every breach of contract action to be a proceeding in rem within 28 U.S.C. § 1655 (1958). As pointed out previously, this would nullify venue requirements in almost every contract action, opening the federal courts to much more litigation that was intended by Congress. And it would also totally destroy the concept of forum non conveniens in federal court proceedings of this nature. Petitioners submit that these considerations are extraordinarily forceful in view of this Court's supervisory power over the federal judicial system, and suggest that the issuance of a writ of certiorari would be proper in this case in order to prevent forum shopping in the federal courts, either as a means of insuring the plaintiff's successful litigation or as a means of harrassing potential defendants.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. HAWLEY,
Counsel for Petitioners

APPENDIX

United States Court of Appeals
Tenth Circuit

A. ALEX SHUFORD, JR.,
Appellant,

vs.

ROY G. ANDERSON, and CURRIER & CARLSEN, INCORPORATED, a corporation,
Appellees.

No. 7853

Appeal from the United States District Court
for the District of Colorado

Before: PICKETT and HILL, Circuit Judges, and CHRISTENSEN, District Judge.

CHRISTENSEN, District Judge.

In this diversity suit the lower court held upon the face of the complaint that service of process could not be effected upon an absent but indispensable party defendant because the action was not one in rem within the contemplation of 28 U.S.C. § 1655.[1] From the order of dismissal for lack of venue entered by the district court on defendants' motions,[2] plaintiff-appellant, A. Alex Shuford, Jr., has taken this appeal.

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[1] 28 U.S.C. § 1655, provides as far as pertinent here that "In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain. . . .

"If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action."

[2] The court had entered an order for service by publication which was accomplished ex parte, and a lis pendens had been filed upon the commencement of the action.

The complaint in substance alleged: That Murphy-Lowell Co., a co-partnership, not a party herein, transferred to the defendant Roy G. Anderson the real property described in the complaint, all located within the State of Colorado, as security for financial aid and assistance; that thereafter the plaintiff Shuford and the defendant Anderson entered into an agreement as joint venturers whereby they agreed to jointly contribute financial assistance to Murphy-Lowell Co., and to Lowell-Murphy & Co., a corporation, another non-party; that the plaintiff and the defendant Anderson agreed to share in the profits or losses arising out of this agreement, "and further agreed that each would have a share in the securities given to either or both of them by the corporation and co-partnership as a consideration for their investments."[3] That pursuant to this agreement the plaintiff Shuford delivered to defendant Anderson a check for $150,250.00, but that the said defendant wrongfully and fraudulently violated the terms and covenants of the agreement by applying the amount delivered to retiring a second mortgage owing against the said real property, and entering into an agreement to sell and selling the property to others without accounting to or recognizing the interest held by the plaintiff or the agreement entered into by the parties; that plaintiff is in need of discovery of the use made of said property together with a constructive trust; that the money furnished by plaintiff was used by the defendant Anderson to purchase a note secured by a deed of trust on the property which were by Anderson transferred to the co-defendant, Currier & Carlsen, contrary to the agreement between the parties; that such transfer was made without consideration and that the note and deed of trust now encumbering the property are held by Currier & Carlsen as trustee for plaintiff. Plaintiff prayed, among other remedies, for the enforcement of an equitable lien and a constructive trust, for the appointment of a receiver, and for general relief.

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[3] The complaint sets out a specific description of the real property to which Anderson had obtained title from Lowell-Murphy & Co., as heretofore alleged, situated in the County of Grand, State of Colorado

In addition to the allegations above mentioned, and more or less commingled therewith, the plaintiff further alleged in substance that the money was procured by the defendant Anderson from the plaintiff by means of false representations, that there had been a breach of a fiduciary relationship, that the defendant had no complete or adequate remedy at law, that there was a necessity of a tracing of all moneys spent and that a complete accounting between the parties was essential. It was further alleged that the defendants had been unjustly enriched in the sum of $150,250.00, and had received other property and securities rightfully belonging to the plaintiff. The prayer in the complaint also asked "for a complete adjudication of the rights of all of the parties to this action (and) for an order enjoining the defendants from acting in a manner inconsistent with the rights of the plaintiff in the real property," and a second claim asked for the appointment of a receiver to prevent waste of rents, issues and profits.

It was upon the basis of the allegations and demands for relief set out in the last paragraph, going beyond reference to the particular real property involved, that the lower court determined that the action was one in personam and not in rem. The court was of the view that essentially the action was one for the breach of an alleged agreement, or for an accounting, or at most for specific performance of a contract. It referred to the assertions that Anderson did not distribute the funds he received in accordance with the alleged agreement, had been "unjustly enriched" by the money, and had disposed of the property "to make execution unavailable," all of which suggested to the lower court that the plaintiff was seeking in personam relief. It was noted "that the plaintiff does not limit his prayer for relief to an adjudication of the rights . . . in specific property but seeks an adjudication of all rights of the parties," and the conclusion was reached that the action was not maintainable as one in rem in this venue under the provisions of Section 1655. Accordingly, the defendants' motions to dismiss the action were granted.

The complaint is not a model of clarity. Its claims

and demands may have been excessively broad for the purposes of an action in rem or quasi in rem. Yet essentially it stated a claim to enforce a lien on or a claim to, or to remove an encumbrance against, the title of real property within the District of Colorado. Hence, venue was properly laid in that district and service of process upon the absent defendant as provided by Section 1655 was permissible.[4] The requisite amount being in controversy, the court had jurisdiction on the ground of diversity of citizenship, plaintiff being a citizen of the State of North Carolina and the defendants being citizens of the State of California.

Except as otherwise provided by law, a civil action, jurisdiction of which is founded only on diversity of citizenship, must be brought in a district where all plaintiffs or all defendants reside. Without attempting to delineate the conceptual and developmental aspects of the problem apart from this statute,[5] it is enough for our purposes to note that as to venue, it may be deemed "otherwise provided" with respect to venue if § 1655 applies, although by its terms the latter section refers merely to service of process.[6]

Prayers or demands going beyond in rem relief do not prevent the court from granting the relief to which a plaintiff is actually entitled.[7] The inclusion of broader claims in a complaint does not of itself negate the right to rely upon § 1655 if the allegations actually set out among others the essential foundations of a civil action to enforce a lien upon or claim to real or personal property within the district and other allegations may be deemed incidental

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[4] The other defendant, Currier & Carlsen, was personally served within the District of Colorado, through its local process agent.

[5] See 1 Moore Federal Practice ¶ 0.142[2.-1], at 1455 (2d ed. 1964); 1 Barron and Holtzoff, Federal Practice and Procedure § 72 at 361 (Rules ed. 1960). Note: Local Actions in the Federal Courts, *70 Harv. L. Rev. 708* (1957).

[6] Ibid. See also Blume, Actions Quasi in Rem under Section 1655 Title 28 U.S.C., 50 Mich. L. Rev. 1 (1951).

[7] Cf. *Porter* v. *Cooke*, 63 F_2 637 (5th Cir. 1933).

to such action.[8] When a claim or lien is sought to be enforced against land within the district, the remedy for an indefinite statement of a claim on which relief may be granted is not dismissal, but the granting of a motion, if one is made, to make more definite.[9] And the fact that to enforce a lien or claim against particular land inquiry must be made of accounts or relationships defining the extent of the lien or claim does not preclude an in rem action.[10]

Hence, apart from mere form or the nature of the evidence that may be necessary to establish the extent of the claim, the inquiry must be whether the complaint states substantially a claim to or lien against the real property situated in the district and specifically described, or whether essentially it comprises a claim merely in personam, with the status of the real property being a mere incidental inquiry.

In *Massie* v. *Watts,* 6 Cranch 148, 10 U.S. 148, 3 L.Ed. 181 (1810), Chief Justice Marshall said that "In a case of fraud, or trust, or of contract, the jurisdiction of a court of chanchery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." The defendants in reliance upon this language would dismiss this action as one of "fraud," "trust" or "contract" and hence not cognizable by § 1655. It is true that involved in that case was a breach of duty which amounted to a violation of an implied contract of the parties concerning the title to land; and it was held that the case was triable as one in personam in a

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[8] It has been held that the remedy in such case may be a motion to strike the other claims against absent defendants to the extent that they are not contemplated by Section 1655. See *McQuillen* v. *National Cash Register Co.*, 112 F_2 877 (4th Cir. 1940). Since, however, we are not now confronted with the question of the effect of an appearance under § 1655 upon the ultimate relief to be granted by the court, we express no opinion on this problem.

[9] *Graff* v. *Nieberg*, 233 F_2 860 (7th Cir. 1956).

[10] Ibid. See also *Porter Land & Water Co. v. Baskin*, 43 F. 323 (C.C. S.D. Calif. 1890).

jurisdiction other than the one in which the land was situated. Indeed, *Massie* has become the leading case to sustain in personam jurisdiction in equity for the purpose of compelling conveyances of land in foreign jurisdictions as a remedy for breach of contract or trust or for fraud, or to enjoin the commission of acts outside the territorial jurisdiction of the court in appropriate cases. But that a claim or lien cannot be prosecuted as an in rem or quasi in rem proceeding in reliance upon § 1655 or its statutory predecessors merely because such claim or lien is based upon contract, fraud or trust, has since *never been* suggested by the Supreme Court as far as we can discover; on the contrary, as we shall presently note, quite the contrary has been expressly held. Nor does the possible existence of in personam jurisdiction to compel specific performance or other appropriate equitable remedies in view of fraud, or a trust relationship as to real property where the parties are regularly before the court, necessarily preclude the right to proceed in rem to adjudicate liens or claims as to real property in the jurisdiction in which the property is situated.

In *Walker* v. *Brown,* 165 U.S. 654, 17 S.Ct. 453, 41 L.Ed. 865 (1897), the doctrine as expressed in *Pomeroy* was accepted that "every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrances with notice." In reversing the lower court for refusing to recognize the existence of a claim in rem, the Supreme Court said: "It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if any such intention arises by a necessary implication from the terms of the agreement, construed with reference to the situation of the

parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third parties who are volunteers or have notice." If we accept the mooted point that state law can be looked to in determining what is a claim or lien to specific property for the purposes of the federal statute,[11] the result would not be altered.[12]

The complaint in this case, apart from any other theory presented by it, expressly alleges an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the complaint. All of the other allegations in a sense orbit around this alleged agreement. Such an agreement, if sustained by the proof, would clearly create an interest in the land, subject to protection by a local action. The extent and the nature of the interest would depend upon other allegations or upon legal implications from the relationship of the parties, but the claim would be created by a pre-existing agreement and not merely by the adjudication of the court.

The case of *Seymour* v. *Freer*, 8 Wall 202, 75 U.S. 202, 19 L.Ed. 306 (1869), is instructive from several viewpoints. Involved was a contract between two persons, the one to furnish money, the other to purchase lands therewith and to receive for his compensation one-half of the profits on the sales of the land. The Supreme Court determined under the facts of that case that not merely a personal claim was involved but an equitable interest in the land and that the parties had a "joint interest in the property." The court added: "There is another view of this subject, which we think may properly be taken. The agreement that the property should be sold, and half of the profits paid to Price,

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[11] Note Local Actions in the Federal Courts, 70 Harvard Law Review 708, 710-711 (1957); *Louisville & N.R.Co.* v. *Western U. Teleg. Co.*, 234 U.S. 369, 34 S.Ct. 810, 58 L.Ed. 1356 (1914); *Erwin* v. *Barrow*, 217 F_2 522 (10th Cir. 1954); *Miller & Lux Incorporated* v. *Nickel*, 149 F. Supp. 463 (N.D. Calif. 1957).

[12] See *Austin* v. *Stephen*, 300 P. 364 (Colo. 1931); *Campbell* v. *Equitable Securities Co.*, 12 Colo. App. 544, 56 Pac. 88 (1899); *Kirchhof* v. *Sheets*, 194 P_2 320 (Colo. 1948); *Jameson* v. *District Court*, 172 P_2 449 (Colo. 1946).

was a charge upon the property, and gave him a lien to the extent of the amount to which he should be found entitled upon the execution of the agreement, according to its terms."[13] The defendants' interpretation of *Massie,* that the existence of an in personam remedy precludes in rem relief was disposed of by the court as follows: "An action at law, sounding in damages, may, undoubtedly, be maintained in such cases for the breach of an express agreement by the trustee, but this in nowise affects the right to proceed in equity to enforce the trust and lien created by the contract. They are concurrent remedies. Either, which is preferred, may be selected. The remedy in equity is the better one. The right to resort to it, under the circumstances of this case, admits of no doubt, either upon principle or authority. Such, in our judgment, were the effect and consequences of the contract."

In addition to an express agreement for an interest in the specific real property within the jurisdiction of the court, the complaint alleges that the defendant Anderson fraudulently withheld or diverted property from plaintiff under circumstances giving rise to a constructive trust, as well as a lien interest through the joint venture undertaken by the parties. The existing law as to both of these additional features of the case is presaged by *Seymour,* supra.

It now seems authoritatively established that actions to establish and enforce constructive trusts in specific real or personal property having its situs within the jurisdiction of the court are actions quasi in rem within the purview of Section 1655.[14] There are other cases which seemingly

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[13] The dissenting opinion argued that there was a mere claim in personam, but that the agreement did not give the joint venturer any interest in the property itself. This view was rejected.

[14] *Jellenik* v. *Huron Copper Min. Co.,* 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1900); *Goodman* v. *Niblack,* 12 Otto 556, 102 U.S. 556, 26 L.Ed. 229 (1881); *Kelleam* v. *Maryland Casualty Co. of Baltimore,* 112 F_2 940 (10th Cir. 1940), reversed on other grounds, 312 U.S. 377, 61 S.Ct. 595, 85 L.Ed. 899 (1941); cf. *Erwin* v. *Barrow,* 217 F_2 522 (10th Cir. 1954). See also *Seven Oaks* v. *Federal Housing Administration,* 171 F_2 947 (4th Cir. 1948); *Midstate Amusement Corporation* v. *Rivers,* 54 F. Supp. 738 (E.D. Wash. 1944); *McMurray* v. *Chase Nat. Bank of City of New York,* 10 F. Supp. 960 (D.C. Wyo. 1935); *Anderson* v. *Benson,* 117 F. Supp. 765 (D.C. Neb. 1953).

take a different view, but to the extent that their factual bases are not significantly different they do not appear to represent the best reasoned cases and are at variance with the rule recognized by the Supreme Court. In *Kansas Gas & Electric Co.* v. *Wichita Natural Gas Co.*, 266 F. 614 (8th Cir. 1920), it was held that a suit by one foreign corporation against another to enjoin the breach of a contract by the defendant to deliver natural gas to the plaintiff at a point within the state where the suit was instituted, was not a local suit to enforce a lien upon or claim to property. The court said that the object of the statute with respect to such claims or liens was "clearly to enable a party to institute an action in a national court, when there is a diversity of citizenship, which, being of a local nature, as distinguished from a transitory action, can only be maintained in the district in which the property affected is situated." It was concluded, however, that "there is nothing in this complaint affecting any right, title, or interest to any real or personal property in the district." In *Wilhelm* v. *Consolidated Oil Corporation*, 84 F_2 739 (10th Cir. 1936), it was said that constructive service under a predecessor section "is restricted to suits in rem or quasi in rem" but that this statute did not apply to a suit by stockholders of a corporation seeking to rescind the exchange of their stock made in accordance with the terms of a tri-party agreement, since this was an essential prerequisite to the granting to them of the other relief sought, including the claim to the stock, and such other relief was held to be dependent thereon and incidental thereto. The court also pointed out that part of the properties involved was situated outside the State of Oklahoma where the suit was pending, and that, hence, any decree to be effective would of necessity have to operate on the person of the defendants and not upon the properties involved; that should the relief be limited to the properties in Oklahoma, the decree would amount to only a partial rescision. And the cases from other jurisdictions do not seriously throw into question the propriety of resort to § 1655 here. *Findlay* v. *Florida East Coast Ry. Co.*, 68 F_2 540 (5th Cir. 1934); *Miller & Lux Incorporated* v. *Nickel*, 149 F. Supp. 463 (N.D. Calif. 1957); *Sugarman Iron & Metal Co.* v. *Morse Bros. Mach. &*

Supply Co., 19 F_2 589 (D.C. Nev. 1927); *Mandley* v. *Backer*, 121 F_2 875 (D.C. Cir. 1941); *McQuillen v. National Cash Register Co.*, 112 F_2 877 (4th Cir. 1940); *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 125 F_2 288 (6th Cir. 1942), and *Ladew* v. *Tennessee Copper Co.*, 218 U.S. 357, 31 S.Ct. 81, 54 L.Ed. 1069 (1910), either sustain personam jurisdiction under the peculiar facts there existing without negating jurisdiction in rem under other allegations, are not in point for other reasons, or seem inconsistent with the settled law in this jurisdiction.

Kelleam, supra, speaks clearly for this circuit. In affirming the trial court's decision in favor of the plaintiff upon substituted service, the court stated that this was an action to impress a trust on real and personal property with a fixed situs and that 28 U.S.C. § 118 (now § 1655) contained the applicable statutory provisions rather than those governing transitory actions. It is true that the Supreme Court reversed on other grounds, holding that it was improper for the federal court to appoint a receiver and to otherwise attempt to adjudicate matters already at issue in a state court proceeding attacking a decree in probate. Notwithstanding the action of the Supreme Court based upon another principle, the law of the case on the point in which we are interested remains to the effect that an action to impress a constructed trust upon specific property held by an alleged wrongdoer may be deemed an in rem or quasi in rem action within the contemplation of § 1655.[15]

There is still another reason why this action may be regarded as one to enforce a lien upon specific property situate within the jurisdiction of the court. While this additional reason is fraught with certain technical difficulties, we are convinced that under the special circumstances

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[15] This is impliedly recognized by the Supreme Court of the United States in *Fischer* v. *American United Life Ins. Co.*, 314 U.S. 549, 62 S.Ct. 380, 86 L.Ed. 444 (1942). In reversing a lower court's ruling there that jurisdiction could be exercised over local deposits under the statute authorizing the bringing in of absent parties the court said: "For unlike the situation in Kelleam v. Maryland Casualty Co., supra, the state court which has command over the rest has not only not undertaken an adjudication of the controversy; it has referred the matter to the federal court."

of this case it also is a valid basis for regarding the action as a local one.

An action for the dissolution of a partnership and the settlement of its affairs, or for a partnership accounting in other connections, has usually been regarded as a transitory action the venue of which is determined by the residence of the parties rather than by the location of the partnership assets.[16] But "if the action is primarily one for the disposition of an interest in real estate, and the settlement or accounting of the partnership affairs is merely incidental, the venue may be determined by the location of the realty dealt with."[17] Apart from any specific agreement, a joint adventurer's lien against the property committed to the joint venture may arise as a matter of law. 30 Am. Jur. Joint Adventures § 39 (1958). And title taken by one adventurer in the property committed to the venture may be deemed held in trust for both. 30 Am. Jur. Joint Adventures § 38 (1958).

A broad application of these rules in context with § 1655 would pose difficulties for under them, apart from any specific agreement, a lien might be deemed one growing out of the very suit in which venue is sought to be established, in which event it is commonly accepted that § 1655 would not apply. The latter consideration was one of the persuasive elements considered by the court in *McNulty* v. *Heine,* 137 F. Supp. 508 (D.C. Md. 1956), citing *McQuillen* v. *National Cash Register Co.,* 112 F_2 877 (4th Cir. 1940), cert. den. 311 U.S. 695, 61 S.Ct. 140, 85 L.Ed. 450 (1940), rehrng. den. 311 U.S. 729, 61 S.Ct. 316, 85 L.Ed. 474 (1940), supra, that "the proceeding must be in aid of some preexisting claim existing prior to the suit in question and not a proceeding to create for the first time a claim to the property as the effect of the proceeding itself." If partnership or joint adventurer's liens arising by operation of law and applied as a result of the proceedings in such cases

[16] Anno: Venue—Partnership Affairs, 33 A.L.R. 2d—914 and cases cited therein.

[17] Ibid at page 918.

would establish venue pursuant to § 1655, venue would exist in the case of partnership accountings in almost every case in the district where the partnership had any property. This in our judgment would be an undue extension of the reach of the statute. However, under the peculiar facts of the present case, we do not believe that the involvement of a joint venture bars recourse to § 1655; on the contrary the section should be applied both on the basis of principle and as a practical matter here.

In *McNulty* v. *Heine,* supra, the court in declining to apply § 1655, emphasized that the action was "not based upon a claim that the defendant is improperly asserting title to assets which in fact belong to the partnership." The complaint in the case at bar contains little if any indication that the contemplated business of the joint venture was ever actually undertaken by defendants. Hence, an accounting in the partnership sense would be all the more secondary, and clearly subsidiary to relief based upon the withholding of the real property from the agreed joint ownership and the use of the very money advanced by plaintiff to enhance Anderson's antagonistic interest therein. For these reasons, among others, another case more closely in point is *Porter* v. *Cooke,* 63 F_2 637 (5th Cir. 1933), supra, where the petition had alleged that the defendants purchased property for themselves with money furnished by plaintiffs for a joint enterprise and sought an accounting and to recover the property. The trial court held that the action was in personam, 58 F_2 1033 (W.D. La. 1931), but the Circuit reversed, determining that the suit was one to enforce an equitable lien within the meaning of the statute providing for service by publication. Even though the complaint had not expressly asked for the declaration of a resulting trust, the court concluded that where the allegations of the petition showed the right of recovery in plaintiffs on that ground equitable relief was grantable under the prayer for general relief. In *Austin* v. *Stephen,* 300 P. 364 (Colo. 1931), supra, the Colorado Supreme Court held that an agreement between the owner of a note and another at the time of the erection of an apartment house providing that one of the persons was to furnish

the plans and specifications and pay various charges and that on the completion of the improvements the building was to be offered for sale and the parties were to participate equally in the sale price after deducting costs, created a joint venture and "that whatever else this contract did or did not do, it gave Stephen an equitable interest in the property in question, hence was one 'affecting the title' thereto, and was recordable."[18]

Here it is alleged in effect that the joint venturer had renounced, and through fraud and dereliction of fiduciary duty sought to frustrate, the purposes of the joint venture and to divert specific property from a pre-existing commitment. The lien and claim of the plaintiff as a joint venturer covers specific real property entirely located within the geographical jurisdiction of the court and is premised not only upon the joint venture relationship but upon express agreement. In addition, the basis of a resulting trust appears. Under these circumstances the claim of the plaintiff is one within the contemplation of § 1655. To hold otherwise would unduly limit the purposes of the statute, would not comport with prior determinations of this court and the Supreme Court of the United States, and would hardly be in keeping with the spirit of modern federal court procedures.[19]

The court also dismissed the action as against Currier & Carlsen, Inc., presumably upon the ground that Anderson was an indispensable party not subject to service of process and that hence the suit could not be maintained even as against Currier & Carlsen, Inc., which was personally

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[18] The significance of *Seymour* v. *Freer*, 8 Wall 202, 75 U.S. 202, 19 L.Ed. 306 (1869) supra, to the same effect is highlighted by the dissenting opinion which had argued that the right to share in the profits of a particular venture may have the effect of rendering a person liable as a partner "but it does not give him any interest in the property itself which was the subject-matter of the adventure."

[19] But for the fortuity that both defendants here happen to reside in the same state, such a holding would also deprive a plaintiff in the position of the present plaintiff from any federal forum whatsoever, despite diversity of citizenship between plaintiff and defendants and the location within the district of the property which it is sought to reach.

served within the jurisdiction. Anderson does appear to be an indispensable party to the controversy.[20] Moreover, without the reach of § 1655 venue would not lie in the District of Colorado because neither plaintiff nor the defendants are residents of that state. 28 U.S.C. § 1391.[21] With Anderson subject to service of process under § 1655, however, by the same token venue in the District of Colorado is established and the indispensable party is brought before the court.[22]

Whether the in rem claim pleaded by plaintiff can be sustained of course will be dependent upon the proof.[23] And as in *Fischer* v. *American United Life Ins. Co.*, 314 U. S. 549, 62 S. Ct. 380, 86 L.Ed. 444 (1942), no opinion is now expressed whether even though the in rem claim can be established the entry of a personal judgment will be possible against Anderson under the circumstances of this case.[24]

Reversed and remanded for further proceedings.

JUDGMENT

Eleventh Day, July Term, Tuesday, July 27th, 1965.

Before Honorable John C. Pickett and Honorable

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[20] Fed. R.Civ. P. 12 and 19(a). *Skelly Oil Co.* v. *Wickham*, 202 F_2 442 (10th Cir. 1953); *St. Louis-San Francisco Ry. Co.* v. *Blake*, 36 F_2 652 (10th Cir. 1929).

[21] "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

[22] *Barney* v. *Baltimore*, 6 Wall 280, 73 U.S. 280, 18 L.Ed. 825 (1868); cf. *Camp* v. *Gress*, 250 U.S. 308, 39 S.Ct. 478, 63 L.Ed. 997 (1919).

[23] It is worthy of note that in *Porter* v. *Cooke*, supra, after jurisdiction under § 1655 was sustained by the circuit court and the case went back to the district court for trial, such trial resulted in an affirmed judgment that there was no trust, no joint venture and no permissible recovery. *Porter* v. *Cooke*, 127 F_2 853 (5th Cir. 1942).

[24] 2 Moore, Federal Practice ¶ 12.13 (2d ed. 1964); compare *McQuillen* v. *National Cash Register Co.*, 112 F_2 877 (4th Cir. 1940), supra; *Salmon Falls Mfg. Co.* v. *Midland Tire & Rubber Co.*, 235 F. 214 (6th Cir. 1922); Anderson v. Benson, 117 F. Supp. 765 (D.C. Neb. 1953).

Delmas C. Hill, Circuit Judges, and Honorable A. Sherman Christensen, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that A. Alex Shuford, Jr., appellant, have and recover of and from Roy G. Anderson and Currier & Carlsen, Incorporated, a corporation, appellees, his costs herein and have execution therefor.

United States Court of Appeals
Tenth Circuit

A. Alex Shuford, Jr., *Appellant,* vs. Roy G. Anderson, and Currier & Carlsen, Incorporated, a corporation, *Appellees.*	No. 7853

ON PETITION FOR REHEARING

Per curiam

Appellant Anderson now argues that the judgment of the lower court should have been affirmed because the order and proceedings below for substituted service upon him had been defective. Having hardly more than men-

tioned this point in his original brief without any supporting argument either in the brief or orally, he well could be deemed to have waived it. *J. F. White Engineering Corporation* v. *United States,* 311 F. 2d 410 (10th Cir. 1962); cf. *Parrott* v. *Whisler,* 313 F. 2d 245 (6th Cir. 1963), and *Taylor* v. *Fee,* 233 F. 2d 251 (7th Cir. 1956). However, a reference to the record establishes that the present claim in substance is devoid of merit.

There was, indeed, a motion to quash service of summons upon Anderson on the ground that the court's order for publication of summons was defective for failure to require him to appear and plead by a designated day certain, even though the published summons directed him to appear and plead "within twenty days" and he did in fact specially appear within twenty days after the date of the last publication. This motion by Anderson was entitled "Motion to Quash" and also included a demand for dismissal of the action for "improper venue". The plaintiff below, appellant here, did not question the irregularity of the process and there is still undisposed of his motion to the trial court for a new order for substituted service requiring the defendant Anderson to appear and plead by a day certain, in order to meet any contention in that respect. The court ruled upon neither this motion nor upon the motion to quash service of process. On the contrary, not even mentioning these matters, it began its decision with the statement, "The question here involved is one of proper venue". Its conclusions were "that the aims and objects of the action determine that the nature and character of this action is in personam and not in rem and is not maintainable in this venue under the provisions of Section 1655"; and it ordered "that the motions of the defendants to dismiss the action are granted and the complaint is hereby dismissed."

This was the order from which the appeal was taken and the one that we have reversed. The case was remanded "for further proceedings". With venue established, it is to be assumed that the trial court will consider whether previous service of process upon Anderson was irregular

or adequate and, depending on such ruling, determine what further action, if any, may be necessary, consistent with our decision, with respect to substituted service of process. These questions were not before us and it would be inappropriate to express any opinion concerning them.

The substance of all other matters presented by the petition for rehearing already has been considered and ruled upon by us adversely to appellant's present contentions.

The Motion for Rehearing is denied.

ORDER DENYING APPELLEE'S PETITION FOR REHEARING

Twenty-First Day, September Term, Thursday, October 14th, 1965.

Before Honorable John C. Pickett, Honorable Delmas C. Hill, Circuit Judges, and Honorable A. Sherman Christensen, District Judge.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

CLERK'S CERTIFICATE

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of record from the United States

District Court for the District of Colorado, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 7853, wherein A. Alex Shuford, Jr. was appellant and Roy G. Anderson, and Currier & Carlsen, Incorporated, a corporation, were appellees, as full, true, and complete as the originals of the same presently remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 21st day of October, 1965.

ROBERT B. CARTWRIGHT

.....

Clerk of the United States Court of Appeals, Tenth Circuit.

SEAL

SUPREME COURT, U. S.
NO. 891

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ROY G. ANDERSON AND CURRENS & CARLSEN, INCORPORATED,

a corporation, *Petitioners*

vs.

A. ALEX SHUFORD, JR., *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ROY G. ANDERSON AND CURRIER & CARLSEN, INCORPORATED,
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BRIEF IN OPPOSITION
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TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Does a Complaint which seeks an injunction respecting certain real property, together with the enforcement of an equitable lien, a constructive trust, a resulting trust, and the appointment of a receiver over such real property sufficiently involve rights to real property so as to come within the purview of 28 U.S.C. § 1655 (1958) for venue purposes?

STATEMENT OF THE CASE

A Complaint was filed by the Respondent against Petitioners in the United States District Court for the District of Colorado on February 17, 1964. (R. 4-11.) Jurisdiction was invoked on the basis of diversity of citizenship. Neither Petitioner was a citizen or resident of the state of Colorado. Thus, Respondent sought to effect service of process under the provisions of 28 U.S.C. § 1655 (1958), it being alleged in the Complaint that the action was one to enforce a lien upon or claim to the real property described in paragraph 17 of said Complaint. (R. 1.) Under the provisions of 28 U.S.C. § 1655 (1958), where the Defendant in such a case cannot be served within the state, or does not voluntarily appear, the court may order the absent Defendant to appear or plead by a day certain.

In this connection, the Complaint contained numerous allegations regarding actions of the Petitioners, which actions affected Respondent's rights to the real property described in paragraph 17 of the Complaint. (R. 6.) In the Complaint, Respondent sought a complete adjudication of the rights of the parties to the action, an order enjoining the Petitioners from acting in a manner inconsistent with the rights of the Respondent in the real property, the enforcement of an equitable lien, together with a constructive trust, resulting trust, and such other, further, and different relief as the Court may have deemed meet and proper in the premises. Respondent further sought to have a receiver appointed to take charge of the property described in the Complaint to prevent further waste and dissipation of said property and the proceeds obtained from its sale. (R. 10, 11.)

Service of process was effected on Petitioner, Currier & Carlsen, Incorporated, by serving a copy of the Summons and Complaint on Bruce Kistler, agent for service of process for said corporation, at Denver, Colorado. Service of process was effected on Petitioner, Roy G. Anderson, by publication, pursuant to Motion and Order of the Court. (R. 14-18.)

In response to the Complaint, Petitioner, Currier & Carlsen, Incorporated, filed a Motion to Dismiss, and Petitioner, Roy G. Anderson, filed a Motion to Quash (R. 19, 20.) The Motions to Dismiss and to Quash were based primarily upon the contention that the United States District Court for the District of Colorado was not the proper venue for the action, that the Court lacked jurisdiction over the person of Roy G. Anderson, and that both process and service of process were insufficient. Memorandums in support of these Motions were filed by Petitioners (R. 20-35), after which Memorandum Briefs in Opposition to said Motions were filed on behalf of Respondent (R. 36-44.)

The main question raised by Petitioners' Motions, and the only question dealt with by the trial court, was whether the action filed against Petitioners was a local, in rem action under which the provisions of 28 U.S.C. § 1655 (1958) could be invoked, or whether the action was a transitory in personam action which would require adherence to 28 U.S.C. § 1391 (a) (1958).

The District Court, on June 22, 1964, entered an Order dismissing Respondent's Complaint on the grounds that . . . "the aims and objects of the action determine that the nature and character of this action is in personam and not in rem and is not maintainable in this venue under the provisions of Section 1655." (R. 51.)

This decision was appealed to the Court of Appeals for the Tenth Circuit. On July 27, 1965, after considering Briefs filed by both parties, together with oral argument, the Court of Appeals for the Tenth Circuit reversed the decision of the District Court. This decision has been reprinted and is contained in the Appendix to the Petition for Writ of Certiorari, beginning at page 15.

In the decision of the Court of Appeals, it was held that the Complaint essentially stated a claim to enforce a lien upon or a claim to real property within the District of Colorado and, therefore, venue within that district and service

of process were permissible under the provisions of 28 U.S.C. § 1655 (1958).

The court further found that the Complaint expressly alleged an agreement between Respondent and Petitioner, Anderson, that each was to have a share in the properties specifically described in the Complaint. The court noted that all of the allegations in a sense orbited around this alleged agreement. Thus, it was held that such an agreement, if sustained by the proof, would clearly create an interest in the land, subject to protection by a local action.

The court further stated that the extent and nature of the interest held by Respondent would be created by a pre-existing agreement and not merely by the adjudication of the Court.

On October 14, 1965, the Court of Appeals for the Tenth Circuit denied a Petition for Rehearing. This decision is reproduced in the Petition for Writ of Certiorari at pages 29 through 32.

REASONS FOR DENYING THE WRIT

The only question for determination in the case at bar is whether it was proper for the trial court to grant a Motion to Dismiss on the grounds of improper venue. As stated by the trial court in its Order: "The question here involved is one of proper venue." (R. 68.)

Thus, the litigation has not proceeded beyond the point of a Motion to Dismiss. No trial has been held on the merits and no opportunity has been afforded the Respondent to submit his evidence in a court of law relating to his interest in the real property herein involved.

On this state of the record it is submitted that the sole question presented for this Court to review is of such little significance and consequence that it does not merit this Court's attention and consideration.

Indeed, it is submitted that the question presented herein for review does not carry with it the momentous concern

throughout the Circuits that further pronouncement from this Court should be required. This is especially true in view of previous pronouncements by this Court relating to the question in the instant case.

It has already been held that actions to establish and enforce constructive trusts in specific real or personal property having its situs within the jurisdiction of the court are actions in rem or quasi in rem within the purview of 28 U.S.C.A. § 1655 (1958). *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1900); *Goodman v. Niblack*, 102 U.S. (12 Otto) 556, 26 L.Ed. 229 (1881). This rule was further implied in this Court's decision in the case of *Fischer v. American United Life Ins. Co.*, 314 U.S. 549, 62 S.Ct. 380, 86 L.Ed. 444 (1942).

In *Jellenik v. Huron Copper Mining Co., supra*, an action was brought asking that a receiver be appointed to take possession of certain property and wind up the company's business. The Plaintiff further prayed for an Order enjoining the company's officers, directors, and agents from intermeddling with the property therein involved. This Court held that the action properly came under the purview of the act of March 3, 1875, Section 8, which was a predecessor and similar act to 28 U.S.C.A. § 1655 (1958). In the course of its decision, the Supreme Court of the United States pointed out that one of the objects of the suit was to remove an encumbrance or cloud upon title to shares of stock of a corporation located in the district in which suit was brought. The Court held that the shares of stock were property within the contemplation of the statute, and that venue and jurisdiction over the Defendants were proper.

Similiarly, it should be pointed out that in the instant case one of the objects of the suit is to determine rights of title in real property and to remove the encumbrance or cloud upon the title to this property. Moreover, the allegations of the Complaint clearly set forth that the real prop-

erty herein involved was to be security given as consideration for investment in the enterprises referred to in the Complaint. Thus, it is contended that *Jellenik v. Huron Copper Mining Co., supra,* is authority for the instant case.

Petitioners appear to base their Petition for Writ of Certiorari on the ground that there is a conflict between the decision of the Court of Appeals for the Tenth Circuit in the instant case and the decisions in other Circuits. Respondent contends that no such conflict, in fact, exists.

The first decision which Petitioners contend conflicts with the decision in the instant case is that of *Jones v. Gould,* 149 Fed. 153 (6th Cir. 1906). An examination of that case reveals that the only in rem aspect therein involved was that the Defendants owned stock certificates, which certificates had a situs in the jurisdiction of the Court. However, looking to both the allegations and the prayer for relief, it is seen that the controversy therein concerned the management activities of the managers. There was no controversy respecting title or claim to an interest in the stock certificates and no controversy respecting ownership of the stock. This, of course, distinguishes *Jones v. Gould, supra,* from *Jellenik v. Huron Copper Mining Co. supra,* and the instant case.

The *Jellinik* case, it is submitted, is more analogous to the case at bar and is in complete harmony with it. The controversy in the instant case involves far more than mere personal activities. Rather, it involves a claim of right in and to real property situated in this jurisdiction — the District of Colorado.

Petitioners next attempt to construe a conflict between the Tenth Circuit and the Second Circuit. The case of *Vidal v. South American Sec. Co.,* 276 Fed. 855 (2d Cir. 1921) is discussed by Petitioners, who contend that the property in the instant case was not a "security" and that there was no agreement relating to any "lien" interest.

Respondent submits that it is inconceivable that at this stage in the proceedings Petitioners can argue that the only

claim which Respondent makes to the land in question is simply as a general creditor. As pointed out in the decision of the court below, the Complaint in this case quite expressly alleges an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the Complaint. "Such an agreement, if sustained by the proof, would clearly create an interest in the land, subject to protection by a local action." (Petition for Certiorari, page 21.)

An examination of the Complaint shows that the transfer of property to Roy G. Anderson was given as security for his lending money to various corporate entities. Subsequently, there was an agreement between Petitioner, Anderson, and Respondent whereby it was agreed that Respondent would also participate in lending money and would receive a share in the *securities* given to Anderson. (R. 2, 3.) Thus, it is submitted that there is clearly a security relationship in the instant case, and Respondents' claim to the real property herein involved is not merely that of a general creditor.

Additionally, it should be pointed out that in *Vidal* no claim was made to the property. The only claim made was with respect to certain alleged commissions. In the instant case, the whole Complaint revolves around the claim of interest and right in real property which is described in paragraph 17 of the Complaint. (R. 3-5.)

The case of *Dan Cohen Realty Co. v. National Sevings & Trust Co.*, 125 F.2d 288 (6th Cir. 1942) is cited by Petitioners for the proposition that the predecessor to 28 U.S.C. § 1655 (1958) and, thus, Section 1655 itself, does not apply to actions for specific performance.

Indeed, in *Dan Cohen* the court found that the gist of the relief prayed for was for a personal decree of specific performance. In the instant case, the trial judge suggested that perhaps that should be the remedy which Respondent should seek, but even the trial judge admitted that such relief was not what was being sought in the instant case (R. 71.) To the contrary, in the case at bar, as distinguished

from *Dan Cohen,* the whole relief sought revolves around an interest in real property described in the Complaint, and the agreement relating to such real property as security for loans made by both Petitioner, Anderson, and Respondent.

Respondent submits that there is no conflict whatsoever between the instant case and the decision in *Dan Cohen Realty Co. v. National Savings § Trust Co., supra. Dan Cohen* simply has no application to the instant case.

Petitioners complain and contend that the court below did not confine the provisions of Section 1655 to liens or claims which are pre-existing. In so doing, Petitioners contend that the holding in the court below is in conflict with the decision in *McQuillen v. National Cash Register Co.,* 112 F.2d 877 (4th Cir. 1940), which, Petitioners argue, held that one of the requirements for the utilization of Section 1655 is that the proceeding be in aid of some pre-existing claim and not a proceeding to create for the first time a claim to the property as the effect of the proceeding itself.

In this connection, it should be pointed out that the litigation in the instant case is to *enforce* a trust in land in which Respondent is alleged to have an interest. This interest has been in existence for some time prior to the suit in the case at bar and came about at the time Respondent agreed to engage in lending activities with Petitioner, Anderson. Thus, Respondent submits that not only is the decision in the instant case not in conflict with *McQuillen v. National Cash Register Company, supra,* but also comports with the long standing rule of this Court in *Walker v. Brown,* 165 U.S. 654, 17 S.Ct. 453, 41 L.Ed. 865 (1897), and *Seymour v. Freer,* 75 U.S. (8 Wall.) 202, 19 L.Ed. 306 (1869).

In *Walker v. Brown, supra,* the Court held that every express executory agreement in writing whereby the contracting party indicated an intention to make some particular property, real or personal, a security for a debt or other obligation, or whereby the party promises to convey or

assign or transfer the property as security, creates an equitable lien upon the property so indicated. This, said the Court, creates an in rem interest from the terms of the agreement.

Similarly, in the instant case, the in rem interest is created by virtue of the contract and circumstances of the parties and *not* merely by the litigation itself.

The case of *Seymour v. Freer, supra,* involved a contract between two persons whereby one was to furnish money, and the other to purchase lands with that money and to receive as his compensation one half of the profits on the sale of the land. This Court determined that under the facts of that case there was not merely a personal claim involved but also an equitable interest in the land, and that the parties had a joint interest in the property.

The Court found that the agreement between the parties created a charge upon the property and gave the Plaintiff a lien to the extent of the amount to which he should be found to be entitled upon the execution of the agreement. Again, the case at bar is similar to the decision of this Court in that it is the agreement between the parties which creates the interest in the land and not the litigation itself.

Petitioner submits that not only is the decision in the instant case not in conflict with *McQuillen v. National Cash Register Co., supra,* but also the decision in the instant case is in complete harmony with previous decisions of this Court in *Walker v. Brown, supra,* and *Seymour v. Freer, supra.*

Nevertheless, even if the action in the instant case were simply to impress a trust, for the first time, on the land in question, there are numerous cases which uphold venue under 28 U.S.C. § 1655 (1958) and its predecessor statutes.[1]

[1] *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 S.Ct. 102 U.S. (12 Otto) 556, 559, 44 L.Ed. 647 (1900); *Goodman v. Niblack*, 102 U.S. (12 Otto) 556, 26 L.Ed. 229 (1881); *Kelleam v. Maryland Casualty Co. of Baltimore*, 112 F.2d 940 (10 Cir. 1940), reversed on other grounds, 312 U.S. 377, 61 S.Ct. 595, 85 L.Ed. 899 (1941); *Erwin v. Barrow*, 217 F.2d 522 (10 Cir. 1954). See also *Seven Oaks v. Federal Housing Administration*, 171 F.2d 947 (4th Cir. 1948); *Midstate Amusement Corporation v. Rivers*, 54 F. Supp. 738 (E.D. Wash. 1944); *McMurray v. Chase Nat. Bank of City of New York*, 10 F. Supp. 960 (D.C. Wyo. 1935); *Anderson v. Benson*, 117 F. Supp. 765 (D.C. Neb. 1953).

Furthermore, it should be remembered that *McQuillen v. National Cash Register Co., supra,* did not specifically hold to the contrary. Moreover, *McQuillen* was a stockholder's action to cause cancellation of certain books of the company and to enjoin the payment of dividends, to cause restitution of dividends and salaries, and to recover damages for transactions that could not be enjoined, rescinded, or cancelled. No restitution or damages, which are admittedly in personam-type judgments, are sought in the instant case.

It is also important to note that in *McQuillen* the Court merely refused to give relief of a personal nature in an in rem action without personal jurisdiction. All that is sought in the instant case are orders relating to rights in real property.

Finally, Petitioners contend that the policy expressed by this Court in *Olberding v. Illinois Cent. R.R.,* 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953) is applicable to the case at bar. The *Olberding* case dealt with the question of venue under 28 U.S.C.A. § 1391 (a) (1958). The Court stated that the requirement of venue under that statute is "specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding, supra,* at page 340.

Respondent, however, submits that the decision and statements contained in *Olberding v. Illinois Cent. R.R., supra,* are not applicable to the instant case in that the venue here under consideration is under a different statute—28 U.S.C. § 1655 (1958). This section, it is submitted, was promulgated in an effort to expand upon Section 1391 (a) so as to allow actions involving rights to real or personal property to be brought where such property is located even though personal jurisdiction may not be afforded over the Defendants involved.

Certainly 28 U.S.C. § 1655 (1958) cannot be recklessly construed. However, to be unduly restrictive in its construction would severely limit the purposes of the statute, and, as

pointed out by the court below, such a construction would not comport with prior determinations of the Supreme Court of the United States and would not be in keeping with the spirit of modern Federal Court procedures.

The court below further pointed out that if venue under Section 1655 were not allowed under circumstances such as exist in the instant case, "but for the fortuity that both Defendants here happen to reside in the same state, such a holding would also deprive a Plaintiff in the position of the present Plaintiff from any Federal forum whatsoever, despite diversity of citizenship between Plaintiff and Defendants and the location within the district of the property which it is sought to reach." (Petition for Certiorari, page 27.)

CONCLUSION

On the basis of the foregoing argument and authority, it is submitted that the question herein involved is not of such significance and consequence as to warrant consideration by this Court and that there is in fact no conflict between the decision below and the decisions in other Circuits and that for these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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